

***United States Court of Appeals
for the Second Circuit***



AMICUS BRIEF

77-6049

UNITED STATES COURT OF APPEALS

for the
SECOND CIRCUIT

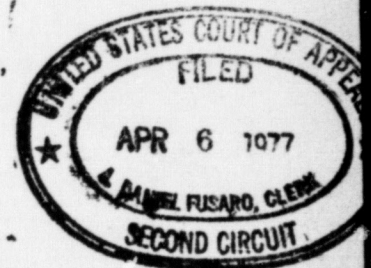
SECRETARY OF THE INTERIOR, et al.,

Appellants,

vs.

COUNTY OF SUFFOLK, et al.,

Appellees.



On Appeal from the United States District Court
For the Eastern District of New York

BRIEF OF AMICUS CURIAE
ASSOCIATION FOR A BETTER NEW YORK, INC.

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COUNTY OF SUFFOLK, et al.,	)	
	)	
Appellees	)	

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

BRIEF OF AMICUS CURIAE
ASSOCIATION FOR A BETTER NEW YORK, INC.

BACKGROUND

This brief amicus curiae is submitted on behalf of the Association for a Better New York, Inc. ("ABNY"), concurrently with the filing of a motion for leave to participate as amicus curiae pursuant to Rule 29 of the Federal Rules of Appellate Procedure. A brief amicus curiae was filed on behalf of ABNY in this action by leave of the District Court.

ABNY files this brief urging this Court to fashion relief which will encourage orderly and expeditious decision making regarding the development of outer Continental Shelf (OCS) energy resources consistent with the mandates of the National

Environmental Policy Act, 42 U.S.C §4321 et seq. ("NEPA").

(a) Interest of Amicus Curiae Association for a Better New York, Inc.

ABNY is an association of business and labor leaders who have organized to identify and act upon issues relevant to the health and vitality of New York City and of the Greater Metropolitan Area.⁽¹⁾ ABNY works closely with governmental officials in furtherance of an understanding and resolution of these issues and of economic forces affecting or impacting upon New York City and its citizens.

ABNY is concerned about the impact of the spiraling cost of energy on businesses and on residences in the City. The high cost of energy and the uncertainty of supplies of natural gas and foreign oil directly influence the businesses and occupations of ABNY members. The City of New York is at a competitive disadvantage with other parts of the nation in regards to the costs of energy. These realities, and the facts underlying them have been recognized (i) in the environmental impact statement relative to the sale of leases for exploration of potential hydrocarbon reserves on the outer Continental Shelf which is at issue here and (ii) by the Court below in its

(1) A list of ABNY Executive Committee Members is set forth herein as Exhibit "A".

Opinion and Order of August 13, 1976 (hereinafter "Opinion" at 5-7). They motivated ABNY representatives to give testimony at the public hearings on both the Sale 40 and the Sale 42 draft Environmental Impact Statements ("EISs"). These hearings were held relative to EISs on the Baltimore Canyon area of the Mid-Atlantic outer Continental Shelf and on the Georges Bank area of the North Atlantic OCS, respectively. At the Sale 40 Environmental Impact Statement hearing, the ABNY representative testified to the "extraordinary cost of energy to the citizens of the Northeast" and stated that "if there is one single factor which threatens the very existence of business in New York City, it is the unbelievable upward spiral in the cost of all forms of energy." He noted particularly the costs of energy for generating electricity, the concomitant cost of electricity, and the cost of energy for heating.⁽¹⁾ He noted two examples of businesses which had recently moved their operations from New York City because of the cost of energy (New York Times Company printing plant and Schaefer Brewery Co.). He stated that the development of energy resources, if found, would stabilize energy supplies and possibly reduce energy costs to the Northeast. Similar testimony was given by many others in the business and

(1) Statement of William D. Swan, Jr., Executive Director, ABNY, at Sale 40 public hearing, January 29, 1976.

labor communities on this issue.⁽¹⁾

It is undisputed that energy supplies are needed. It is undisputed that the Atlantic outer Continental Shelf offers a possible source of energy resources in the form of petroleum and natural gas. The decision to accelerate exploration for energy resources on the outer Continental Shelf was made by the Secretary of the Interior on September 29, 1975 in his decision to adopt the national accelerated outer Continental Shelf oil and gas leasing program (I EIS 35, Opinion at 13-15). That decision was made after full consideration was given to its environmental implications as documented in an environmental impact statement covering the whole national program of accelerated leasing for oil and gas exploration and development pursuant to NEPA (42 U.S.C. § 4321 et seq.). The final programmatic impact statement was issued on July 7, 1975 (I EIS 35).

The need for energy, and the importance of energy resources to New York City, New York State and the northeastern United States is recognized in the accelerated OCS oil and gas lease programmatic EIS and in the Sale 40 EIS (II EIS 241-2).

(1) See III EIS 450 et seq., and testimony of Peter J. Brennan, Chairman, Committee For Jobs and Energy Independence, Public Hearing on North Atlantic OCS Lease Sale, December 7, 1976.

It was also recognized by the Congress in the recently enacted amendments to the Coastal Zone Management Act ("1976 Amendments", P.L. 94-370, July 26, 1976, 16 U.S.C. § 1451 et seq.).

New York City, the New York harbor and the State of New York are recognized by the Federal Government as being inexorably involved in Atlantic OCS oil and gas exploration and development. This recognition is repeatedly documented in the Sale 40 EIS before this Court.

In discussing the impact of the exploratory phase of OCS activity for servicing offshore facilities, the Bureau of Land Management ("BLM"), the agency with jurisdiction over lease sales, recognized that OCS-related activity would operate out of the Port of New York. BLM stated that such activity "would have a positive economic impact upon the areas by increasing the usage of industrial land and structures which are presently vacant, underutilized or marginally used" and that "economic development within the ports would be facilitated" (II EIS 167).

The facilities required for OCS exploration and discovery are described in the EIS (II EIS 217).⁽¹⁾ Existing

(1) Recoverable resources from the 154 tracts at issue in the subject lease sale are estimated to range between 0.4 and 2.6 billion barrels of oil and between 2.6 and 12.8 trillion cubic feet of gas (II EIS 216). Facilities estimates are set forth at Table III-30 (II EIS 217) as follows:

[footnote continues]

port facilities, including those at the Port of New York, are expected to be utilized as staging and supply bases during both the exploratory and development stages (II EIS 226). Platform fabrication and heavy pipeline fabrication functions can be carried out expeditiously and efficiently in New York. There are many advantages to the utilization of New York as a central location for many OCS-related activities. These advantages include a skilled, stable labor force which is underutilized, major underutilized harbor facilities and excellent transportation access. These facts have been recognized by the BLM and have been considered in the EIS (II EIS 222-239; see also "Coastal Effects of Offshore Energy Systems - An Assessment of Oil and Gas Systems, Deepwater Ports, and Nuclear Power Plants Off The Coast of New Jersey and Delaware", Office of Technology Assessment, U.S. Congress, November 1976, at 140-172).

[continuation of footnote (1) from page 5]

Table III-30 Estimated Range of Major Facilities Anticipated to be Required as a Result of Proposed OCS Sale #40

Rigs (Maximum working at one time)	
--exploratory	5-20
--development	5-20
Platforms	10-50
Terminal/Storage Facilities	1- 4
Onshore Operations Base	1- 4
Gas Processing Plants	3- 8
(Units with capacities of 300/500 mcf/d)	

It is the official policy of the City of New York to encourage the fabricators and suppliers of heavy equipment to conduct their operations in New York. It is also the official policy of the City of New York to encourage the supply and staging activities needed for servicing OCS facilities to locate in the City. New York Deputy Mayor Osborn Elliott testified at trial that his office was actively discussing the appropriateness of New York City as a base for many OCS operations with all segments of industry related to OCS activity. He stated that the City's policy "has been supportive of the development of offshore properties within proper environmental and policy stipulations." Deputy Mayor Elliott testified that the City believes that jobs can be created by the development of offshore properties and that the City "intends to do everything it [can] to attract those jobs to this area." (Tr. 878)

(b) These Proceedings

This proceeding is on an appeal from the Final Memorandum and Order of Judge Jack B. Weinstein in the United States District Court for the Eastern District of New York entered February 17, 1977 (the "Order"). By the terms of the Order, the subject leases for exploration and development of OCS resources were declared null and void and the parties were

enjoined from further proceeding with activities under such leases. The Court below based its decision on its finding that the Secretary of the Interior had violated NEPA in his preparation of the Sale 40 Environmental Impact Statement. The Court below held that the Environmental Impact Statement was inadequate as a matter of law because it failed to adequately describe "the practical efforts" of local governmental powers, the environmental impact of "specific probable pipeline routes", production and the costs of production, the effect of the tract selection choices on pipeline feasibility, and the alternative of separating exploration from production leasing.

(c) Issue Presented

On this appeal, this Court must consider whether, under the "factual predicate" standard of Kleppe v. Sierra Club, 427 U.S. 390 (1976) and the rule of reason standard of EIS review, the Sale 40 EIS inadequately considered the environmental issues found dispositive by the Court below.

ARGUMENT

I. THE SALE 40 LEASE DECISION IS A PART OF A CONTINUUM OF DECISIONS EACH OF WHICH IS SUBJECT TO NEPA.

The decision to offer a group of OCS tracts for sale took

place in the context of continuing governmental policy decisions. These decisions involve national policy issues, the general and specific implementation thereof. This continuing decision-making process, and the "continuing control" available by the government over each decision must be considered in determining the reasonableness of an Environmental Impact Statement prepared in connection with each decision. Sierra Club v. Morton, 510 F.2d 813, 828 (5th Cir. 1975). The factual predicate to each decision determines the appropriate scope and intent of the impact statement for each of these decisions. Kleppe v. Sierra Club, 427 U.S. 390, 402 (1976).

(a) The National Energy Policy Decision

The President and the Congress are now considering and have given considerable consideration in the last several years to broad national energy policy issues.⁽¹⁾ These de-

(1) cf. Presidential message accompanying proposed Energy Independence Authority Act of 1975, 10 U.S. Cong. News '75 1501; Energy Policy and Conservation Act, 42 U.S.C. § 6201 et seq.; Energy Supply and Environmental Coordination Act of 1974, 15 U.S.C. § 791 et seq; Federal Energy Administration Act of 1974, 90 Stat. 784; Natural Gas and Pipeline Safety Act Amendments of 1976, 90 Stat. 2073; Solar Energy Research, Development and Demonstration Act of 1974, 88 Stat. 1431; Solar Heating and Cooling Demonstration Act of 1974, 88 Stat. 1069.

liberations have led to decisions involving major institutional responses within the government such as the creation of the Energy Research and Development Administration and the Federal Energy Administration. They have also led to the examination of the development potential of many kinds of energy resources, such as solar, nuclear, coal, oil and gas resources. Consideration has been given to oil and gas resources in Northern Alaska, in western states oil-shale formations, in naval petroleum reserves and on the OCS.

(b) Accelerated Leasing Program

The accelerated leasing program was formulated on the basis of extensive research into the availability of petroleum reserves thought to exist on the whole OCS. In the course of such research, industry, governmental agencies at all levels and "interested members of the public" were surveyed. "Major resource, environmental and technical factors" were weighed (I EIS 34). Planning and evaluation of OCS leasing issues were considered for at least two years by the Department of the Interior. During this consideration, OCS leasing was considered in the context of the national energy policy. Energy policy alternatives were considered and environmental issues were considered on the national scale (I EIS 30-35).

The Acting Secretary "approved a program to accelerate oil and gas leasing" on the OCS on September 29, 1975 (I EIS 35). This program included a proposed timetable for all of the steps which are necessary antecedents to each specific sale, including the conduct of baseline studies, the call for nominations, announcement of tracts, preparation of environmental statements and the conduct of public hearings (I EIS 33).

(c) Sales of Leases

The approval of the accelerated OCS oil and gas leasing program did not constitute a decision on any particular lease sale. Accordingly, the approval of the accelerated leasing program including several proposed Mid-Atlantic lease sales did not "constitute a decision on this [Sale 40] proposed lease sale." (I EIS 36.)

The Sale 40 lease sale has been the subject of intense specific consideration which related to the regional issues appropriate to the consideration of a specific type and kind of OCS development in a specific region of the OCS. Energy needs of the region were properly considered as were regional economic and environmental issues. These issues were considered fully to the level of detail appropriate to this level of planning.

Similar consideration has been given to the regional issues present in the Sale 40 area as was given to other lease sales, such as the North Atlantic sale (Sale 42), Sale 35 (Southern California Association of Governments v. Kleppe, 413 F. Supp. 563, (D. D.C. 1976)), and Sale 39 (State of Alaska v. Kleppe, No. 76-0368, 9 ERC 1497 (D. D.C. August 13, 1976)). Regional and national environmental issues, which can be known and evaluated at this level of consideration are appropriate for consideration in lease sale deliberations. Natural Resources Defense Council, Inc. v. Morton, 458 F.2d 827 (D.C. Cir. 1972).

- (d) Exploratory Drilling on each lease tract requires Federal Approval

Upon the execution of a lease between the government and the successful bidder, the lessee develops extensive plans for the exploration of resources on the tract covered by the lease. Geological Survey regulations require that these "exploratory drilling plans" for each tract be documented and submitted to the Area Oil and Gas Supervisor, Conservation Division, U.S. Geological Survey (30 C.F.R. § 250.34(a)). The Supervisor is a "representative of the Secretary" (30 C.F.R. § 250.2).

The exploratory drilling plan submitted to the Super-

visor must include detailed information on the following:

(1) "a description of the drilling vessels, platforms or other structures showing the location, the design, and the major features thereof, including features related to pollution prevention and control"; (2) the general location of each well; (3) structural information; (4) other data as required by the Supervisor (30 C.F.R. § 250.34(a)).

The exploratory drilling plan is submitted in support of an application for a Permit to Drill (30 C.F.R. §240.34(d)). Only upon issuance of the drilling permit can actual exploratory work proceed.

(e) Development and Production on Each Lease Tract
Requires Federal Approval

If recoverable quantities of oil or gas are discovered on leased OCS tracts during exploratory drilling the lessee develops detailed development plans. These development plans describe for the development phase the same kind of details as were required to be submitted for the exploration phase. This information must be submitted to the Governor of each affected state and to the Geological Survey Supervisor. Additional information is submitted to the Governors, including a description of all offshore and onshore facilities and operation proposed by the lessee directly related to the proposed

development, including location, size, requirements for land, labor, materials and energy, and timing of development and operation." (30 C.F.R. 204.34(c), emphasis added.)

Secretary of Interior Cecil D. Andrus reemphasized the involvement of the states and of federal cooperation with the states in coordinating OCS activities at the time he decided to appeal the decision below. At that time, he reaffirmed the requirement "that information on exploration and development plans be submitted to the affected States for review and comment before they are approved." (See Department of Interior News Release, March 1, 1977, Appendix B, Federal Appellants' Motion for Expedited Appeal.)

The information is submitted in connection with the application for development drilling permits. The Supervisor decides whether the drilling permits should be issued after appropriate consideration, including consultation with the affected states.

(f) Transportation and Onshore Siting Decisions
Require Federal Approvals

In addition to the many levels of federal decision-making involved in developing OCS leases described above, specific pipelines and onshore support facilities are individually subject to many federal decisions. Dredge and fill per-

mits are required from the Army Corps of Engineers for work in navigable waters in connection with dock facilities and waterfront access pursuant to Section 404 of the Federal Water Pollution Control Act Amendments of 1972 ("FWPCA", 33 U.S.C. § 1344). Many classes of projects require water pollution discharge permits under the NPDES permit system (33 U.S.C. § 1342) or state water quality certifications (33 U.S.C. § 1341). Coastal zone management plan certifications are required (16 U.S.C. 1456(c)(3)(B)). Additional federal clearances are required pursuant to Section 208 of the FWPCA (33 U.S.C. 1288) and the Clean Air Act (42 U.S.C. § 1857 et seq.).

(g) Each of These Federal Decisions Requires NEPA
Mandated Consideration of Environmental Issues

NEPA applies to all federal decision-making, 43 U.S.C. § 4331. In the landmark case of Calvert Cliffs Coordinating Committee v. AEC, 449 F.2d 1109 (D.C. Cir. 1971), cert. denied, 404 U.S. 942 (1972), Judge Wright stated that "perhaps the greatest importance of NEPA is to require . . . agencies to consider environmental issues just as they consider other matters within their mandates" (449 F.2d at 1112; emphasis in original). This requirement for consideration of environmental implications of federal decision-making applies to all federal decisions (42 U.S.C. § 4332(2)(A)). Environmen-

tal implications must be considered under NEPA irrespective of whether environmental statements are prepared. Trinity Episcopal School Corp. v. Romney, 523 F.2d 88 (2d Cir. 1975). Decision-making involving "major federal actions significantly affecting the quality of the human environment" requires the preparation of an environmental impact statement (42 U.S.C. § 4332(2)(C)).

Each of the federal decisions which has been made and which might yet be made in the progression of decisions leading to the development of oil and gas reserves on each OCS tract is subject to a NEPA review. The decision to accelerate the OCS leasing program was subject to a NEPA review and an EIS was prepared (I EIS 35). The Sale 40 decision was subject to a NEPA review and the EIS at issue in this proceeding was prepared. Each exploratory drilling and development program required to be submitted to the U.S. Geological Survey Supervisor will be subject to a NEPA review.

Secretary Andrus has decided that an EIS will be required in connection with the federal approval of individual tract development places. (Department of the Interior News Release, March 1, 1977, Appendix B, Federal Appellants' Motion for Expedited Appeal.) Accordingly, the specific environmental implications of development of each of the 93 tracts that were

sold at Sale 40 will be the subject of a separate impact statement. If any other requested federal action meets the NEPA threshold set forth at 42 U.S.C. § 4332(2)(C), an environmental statement will be prepared on the environmental implications of the specific requested federal action (III EIS 44; Hanly v. Kleindienst, 471 F.2d 823, 830 (2d Cir. 1972), Cady v. Morton, 527 F.2d 786 (9th Cir. 1975)). Proposed onshore facilities requiring permits would also be subject to NEPA reviews, and possibly to impact statements. (II EIS 449-459; cf., Natural Resources Defense Council v. Calloway, 524 F.2d 79 (2d Cir. 1975); Zabel v. Tabb, 430 F.2d 199 (5th Cir. 1970).)

II. THE FACTUAL PREDICATE DETERMINES THE ISSUES AND LEVEL OF ANALYTIC DETAIL APPROPRIATE TO A PARTICULAR EIS

While NEPA requires consideration of all environmental implications of a proposed federal action, the facts surrounding each particular proposed action or decision must be examined before the federal official determines which environmental issues must be addressed, and to what detail. The "factual predicate" controls "the production of an environmental statement of the type envisioned by NEPA." Kleppe v. Sierra Club, supra, 427 U.S. at 42, 1976. The kind of impact statement which may be required depends on the kind of "'federal action' being taken." Aberdeen & Rockfish R. Co. v. SCRAP, 422 U.S. 289, 322 (1975). In an energy resources development

case similar to this one, the Supreme Court noted that "the statement on a proposed mining plan or a lease application may bear little resemblance to the statement on the national coal-leasing program." Kleppe v. Sierra Club, supra, 427 U.S. at 402, n. 14.

(a) Nationally Important Decisions

When a nationally significant action is proposed, nationally significant environmental issues are properly considered under NEPA. Where a national issue such as the environmental effects of a new nuclear program are at issue, NEPA requires consideration of the environmental issues appropriate to the scale of such a decision. Natural Resources Defense Council v. Nuclear Regulatory Commission, 539 F.2d 824, (2d Cir. 1976). In such a case the appropriate statement "differs from a standard environmental statement in that it addresses the generic or overall consideration of the undertaking rather than analyzing only the isolated impact of the undertaking in one given area." 539 F.2d at 829, n. 1.

At the national policy level, environmental impact statements have considered issues of federal-state relationships regarding oil pipeline siting questions. In Wilderness Society v. Morton, 479 F.2d 842 (D.C. Cir. 1973),

the environmental impact statement considered the effects of intergovernmental relationships on the Alaska pipeline decision, giving particular attention to alternatives of pipeline locations within Alaska and Canada. While the intergovernmental issue was not dispositive of that case, it demonstrates the Interior Department's recognition of the need to consider nationally important federal-state relationship issues in impact statements related to pipelines.

The close relationships in the highway program has led to situations where the intergovernmental relationships determined factual situations which had to be considered as part of the NEPA review. Thus, in No East-West Highway Committee v. Whiteker, 403 F. Supp. 260 (D.N.H. 1975) the relationship between federal planning of a "skeletal background" of a highway would have to be considered in an impact statement upon the location of the highway when the location is subsequently defined. Similarly, where the California State Water Resources Control Board determination of the amount of water which could be withdrawn from a Bureau of Reclamation dam would have affected the environmental consequences of the dam, the environmental impact statement for the dam had to consider these implications. Environmental Defense Fund v. Armstrong, 356 F. Supp. 131 (N.D. Cal. 1975) aff'd, 487 F.2d 814 (9th Cir. 1973).

(b) Decisions with Regional Environmental Significance

Where regional actions are before the Federal Government for a decision, an environmental statement addresses the regional environmental issues raised by the proposed regional action. Kleppe v. Sierra Club, supra; Natural Resources Defense Council v. Morton, 458 F.2d 827 (D.C. Cir. 1972). Where a highway is planned along a several hundred mile route, an impact statement is required on the whole route so that the regionwide environmental issues can be considered. Conservation Society of Southern Vermont v. Secretary, 508 F.2d 927 (2d. Cir. 1974), vacated, 423 U.S. 809 (1975), reversed on other grounds due to an unrelated statutory change, 531 F.2d 637 (2d Cir. 1976).

The Court below found that inadequate consideration had been given in the EIS to the states' powers to prohibit pipelines from crossing their shores. The Court reasoned that there were many state and local statutory powers, including state wetlands protection acts, state impact statement requirements, state CZMA management plans and local zoning powers, and that the administration of these statutory powers by state and local governments would ultimately determine whether pipelines or tankers would be utilized to transport offshore oil to shore. Because the specific pipeline routes would have environmental implications, and because tankers,

which would be used if pipelines were not allowed, involve other environmental risks, Judge Weinstein held the EIS to be inadequate because it did not give full and explicit attention to detailed pipeline routes, their environmental effects and the potential exercise of state and local regulatory powers over the pipeline route decisions.

(c) Decisions with Localized Environmental Significance

It is well established in NEPA case law that the localized environmental impacts of specific projects must be considered. For example, localized environmental effects have had to be considered in connection with a drug dispensing center in Foley Square,⁽¹⁾ the construction of a post office garage,⁽²⁾ a dredging project at New London, Connecticut⁽³⁾ and the demolition of the historic old Westchester County Courthouse at White Plains as part of an urban renewal project.⁽⁴⁾

(1) Hanly v. Mitchell, 460 F.2d 640 (2d Cir. 1972); see also Hanly v. Kleindienst, 471 F.2d 823 (2d Cir. 1972).

(2) Chelsea Neighborhood Ass'n v. U.S. Postal Service, 516 F.2d 378 (2d Cir. 1975).

(3) Natural Resources Defense Council v. Calloway, 524 F.2d 79 (2d Cir. 1975).

(4) Save The Courthouse Committee v. Lynn, 408 F. Supp. 1323 (S.D.N.Y. 1975).

III. AS SALE 40 PRESENTS REGIONAL ISSUES THE SALE 40 EIS
SHOULD ADDRESS REGIONAL ENVIRONMENTAL ISSUES

Sale 40 involved the leasing of 93 tracts covering 529,466 acres of OCS lands. The economic and environmental implications are directly perceived to involve the states of New York, New Jersey, Maryland, Delaware and Virginia. Indirect implications of the Sale 40 decision involve the whole East Coast of the United States. It is appropriate for the Sale 40 EIS to address the regional environmental issues effecting this whole area. Sierra Club v. Morton, supra; NRDC v. Morton, supra.

Individual, site-specific environmental effects must be considered in connection with site-specific decisions. In Cady v. Morton, supra, the Ninth Circuit held that the development plan for a 770 acre tract required EIS scrutiny, even though it was part of a regional development scheme which also required an EIS. The Court held that "each specific mining plan functionally equivalent to the 770 acre plan for which an EIS has been prepared must be accompanied by an adequate EIS." 527 F.2d at 795. Such an EIS must address specific impacts which can be known as the specific plan is developed.

Judge Weinstein committed reversible error in finding

that "the Sale 40 Environmental Impact Statement is a 'site-specific' impact statement." (Order at 23.)

The clear error of Judge Weinstein's finding is evident on its face. The Sale 40 EIS was required to reasonably describe the environmental implications of the whole 529,466 acre lease sale on the East Coast of the country. The "factual predicate" of such a proposed action involves broad regional issues which must be identified and analyzed to a level of detail appropriate to the contemplated decision.

The Court below erroneously applied a standard to the impact statement's analysis of issues related to the impact of state and local exercise of onshore regulatory powers to pipeline route locations which is inconsistent with the Supreme Court's factual predicate standard. Kleppe v. Sierra Club, supra.

The Court below in its August 13, 1976 Opinion stated that the EIS at issue in this proceeding adequately considered all sociological, ecological, economic, social and other implications of the lease sale at issue except those related to the powers of the states to restrict pipelines. This finding was twice upheld by this Court. (Opinions of August 16, 1976 and October 14, 1976.)

(a) Generic Consideration of State Land Use
Powers Affecting Pipelines

The method of transporting oil or gas to shore from Sale 40 lease tracts depends primarily on the amount and distribution of oil and gas found on specific tracts. Without knowing quantities and distribution of recoverable resources it is impossible to analyze specific pipeline proposals. Responsible analysis, absent such specific information, involves identifying the parameters which constrain decisions and defining assumptions for purposes of predictive analysis. The EIS reflects such analysis.

Transportation of recoverable oil and gas received extensive attention in the EIS. The need to transport the recoverable oil and gas from the OCS, and the various methods of doing so are described in the EIS (I EIS 14-19). The basic assumptions related to the transportation of oil and gas during production are described (II EIS 9-21). The probability of spills from tanker accidents and operations is analyzed (II EIS 30-33) as is the probability of spills from pipeline accidents (II EIS 24-27). The physical and chemical fate of oil and oil spill trajectories are set forth (II EIS 38-94). Special lease stipulations are described in the statement relating to the shipping of oil (II EIS 463), the potential pipeline corridors and the burial of pipelines (II EIS 464).

The underlying assumption in the EIS is that pipelines will be used to bring oil ashore from these tracts if feasible. The EIS notes, however, factors which could "hinder or prohibit use of pipelines" and make pipelines "technically and/or economically" unfeasible, thereby requiring the use of tankers (II EIS 20). These factors are stated to include inadequate recoverable amounts of resources, widespread dispersal of resources, and lack of "receptivity of state and local jurisdictions along Mid-Atlantic Coasts to the approval of pipeline landfalls that would be needed" (II EIS 20-21).

This represents analysis to an adequate degree of detail given the "factual predicate" for this generic description of pipeline and tanker transportation. It is conceptually impossible to know more specifically at this time the details of quantity or distribution of recoverable resources. The state of knowledge has not yet advanced sufficiently. It is for this purpose that exploration is proposed to take place. Only after exploratory drilling and related geological studies are conducted will information regarding distribution and quantity of oil and gas be known.

The Environmental Impact Statement prepared for

the Sale 40 decision adequately addresses the issues of transportation of potential recoverable reserves and the role of states in determining the use of pipelines for this purpose. The EIS recognizes that states have the power to make these determinations and that there is the possibility that state decisions may make pipeline transportation impossible or unfeasible (III EIS 32, 46). These state powers were described in the EIS (II EIS 426-431). Without knowing if there is oil or where it is, it is impossible to be more specific regarding potential state governmental action. The EIS in this regard is adequate because it addresses the issues to a degree appropriate to the existing "factual predicate." Kleppe v. Sierra Club, supra. Appropriate allowances must be allowed for the inexactness of this predictive analysis. Kleppe v. Sierra Club, supra, at n. 14.

Generic analysis where site-specific analysis is not possible is a recognized approach for an impact statement and is accepted in NEPA case law. For example, where new nuclear technology was being considered for research but no specific application had yet been proposed, the environmental impact statement could only analyze generic issues. National Resources Defense Council v. Nuclear Regulatory Commission, supra.

- (b) By The Applicable Standard, The "Rule of Reason", The Sale 40 EIS is Adequate As A Matter of Law

The standard to be applied by Courts reviewing the adequacy of impact statements is a standard of reasonableness. "[A]n EIS is required to furnish only such information as appears to be reasonably necessary under the circumstances for the evaluation of the project. . . ." Natural Resources Defense Council v. Calloway, 524 F.2d 79, 88 (2d Cir. 1975). "In determining whether an agency has complied with Section 102(2) [42 USC § 4332(2)], we are governed by the rule of reason. . . ." Sierra Club v. Morton, supra, 510 F.2d at 819 emphasis in original; Aeschliman v. NRC, 547 F.2d 622, (D.C. Cir. 1976). In the previous appeal in this case, the this Court noted that the appropriate standard for evaluation of the statements in this case was the "practical rule of reason" (Opinion of October 14, 1976 at 2). This standard is used to evaluate the degree of analysis given to each and all environmental issues and is consistent with the requirement that consideration be given to all environmental issues. Calvert Cliffs' Coordinating Committee v. AEC, supra, 449 F.2d at 1122; Save Our Ten Acres v. Kreger, 472 F.2d 463, 467 (5th Cir. 1973). This standard is in contrast to the "arbitrary and capricious" standard to be applied in reviewing the agency's threshold determination of whether to prepare a statement on a

proposed action. Hanly v. Kleindienst, 471 F.2d 823, 829 (2d Cir. 1972).

The reasoning in Sierra Club v. Morton, supra, is directly relevant to this case. The issue in that case was the adequacy of the impact statement prepared in connection with the sale of 147 tracts of outer Continental Shelf lands along the coasts of Mississippi, Alabama and Florida (known as the MAFLA Sale). The Fifth Circuit there recognized that the standard for review of the environmental impact statement was the "rule of reason." 510 F.2d at 819. The Court qualified this rule noting that the continuing relationship and control between the federal agency and the lessees must be considered in determining the reasonableness of the impact statement. The Court stated:

"The MAFLA sale is a unique form of federal action. It does not involve a single undertaking or a project which becomes a fait accompli the day the decision to proceed is made. Because it contemplates numerous, successive lessor-lessee relationships involving activities over many areas and over many years, the agency's continuing opportunity for making informed adjustments has a major effect upon our evaluation of the sufficiency of the materials contained in the EIS itself." 510 F.2d at 828 (emphasis in original).

The impact statement at issue in this case reasonably

apprises decision-makers of the pipeline-tanker issue and of the existence of state powers that may subsequently influence that issue. The rule of reason standard is satisfied in the continuum of decisions and the statement must be held adequate as a matter of law. The statement adequately appraises decision-makers of these issues.

(c) Analysis of Site-Specific Impacts

Exploratory drilling, if allowed, will take place on the Mid-Atlantic OCS prior to submission of development plans to the U.S. Geological Survey. Prior to development-plan submission, coastal zone management plans will be developed by each of the states potentially impacted by this OCS development. More experience will be developed by these states in implementing their own environmental protection laws. For example, land use regulations will be promulgated under the New York Tidal Wetlands Act (Article 25, Environmental Conservation Law) and the New York State impact statement law (State Environmental Quality Review Act, Article 8, Environmental Conservation Law) will be fully implemented.

After partial exploration and after implementation of these state laws there will be a sufficient "factual predicate" to consider the environmental effects of specific

offshore and onshore plans, including specific pipeline locations. Information will be available regarding specific positions being taken by states and localities relative to specific alternative pipeline locations. Local zoning and community attitudes can be ascertained and analyzed. At that time specific feasibility analyses can be performed concerning the economic, environmental and governmental realities and, after NEPA analysis, decisions can be made. Secretary Andrus has committed the Government to preparing an EIS on each development plan (Department of the Interior News Release, March 1, 1977, Appendix B, Federal Appellants' Motion for Expedited Appeal). Judicial review of these decisions of the site-specific EIS is then available.

The EIS recognizes that NEPA analysis will be conducted on the lessees' development plans in connection with their applications for drilling permits. (III EIS 44.) Those development plan submissions to the Geological Survey and to the Governors will contain, in great detail, the offshore and onshore requirements of lease development. They present detailed proposals and alternatives for transportation of recoverable resources to shore. Sufficient "factual predicate" will then exist for meaningful specific analysis of potential state regulatory responses to these detailed proposals. When these facts are available an informed public and informed agencies can

consider prospective application of state laws to the development plan proposals.

It is conceptually premature to expect such a level of analysis in the EIS on the Sale 40 group of leases at this time.

IV.

CONCLUSION

The analysis of specific implications of local governments' permitting and licensing powers over onshore activities, of specific pipeline routes and impacts thereof, and of the magnitude of oil production and costs thereof is appropriate to an impact statement on site-specific development plans. The EIS before this Court in this appeal is a regional EIS and must consider regional environmental issues to a degree sufficient to inform decision-makers of the factors involved. Environmental Defense Fund v. Corps. of Engineers, 492 F.2d 1123 (5th Cir. 1974). The Sale 40 EIS meets the requirement that the impact statement "compel federal agencies to give serious weight to the environmental factors in making discretionary choices." Monroe County Conservation Council v. Volpe, 472 F.2d 693, 697 (2d Cir. 1972).

This Court should recognize the factual predicate of this regional EIS, the continuing control which will be exercised by the federal government over the exploration and development

of OCS resources, and the applicability of NEPA to each successive step in this continuum of decisions. This Court should reverse the decision of Judge Weinstein and allow further activities under the Sale 40 leases to continue subject to further applicability of NEPA.

March 31, 1977.

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RICHARD J. ROSENTHAL, an attorney admitted to practice in the courts of New York, affirms under the penalties of perjury that he is not a party to this action and is over 18 years of age, and that on the 1st day of April, 1977, he served two copies of the annexed Brief of Amicus Curaie

upon the following named attorneys at the addresses indicated by depositing true copies thereof enclosed in properly addressed postpaid wrappers in an official depository of the United States Postal Services within the State of New York:

SEE ATTACHED EXHIBIT A

Dated: April 1, 1977

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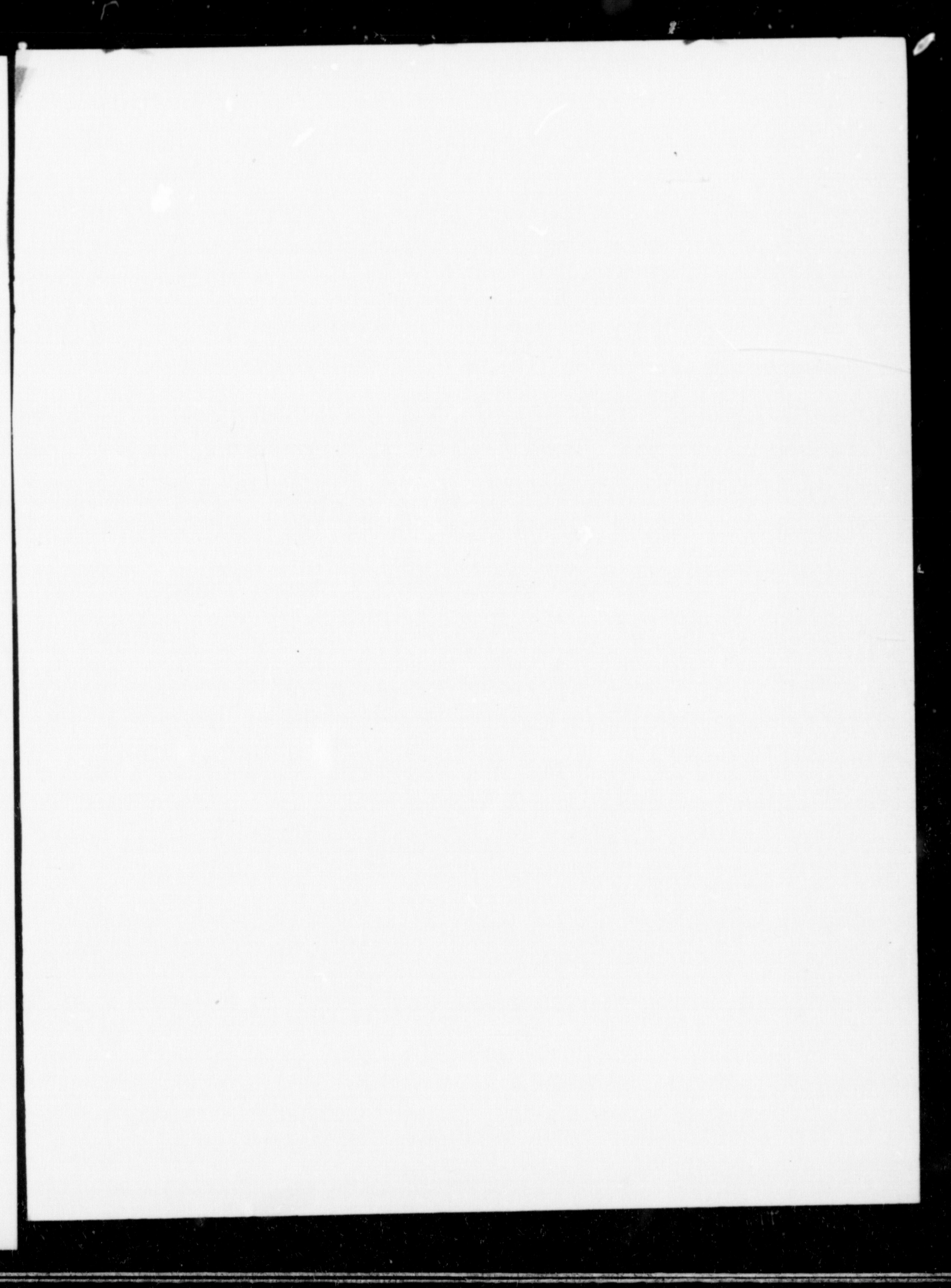


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